Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1825

BRUCE BAKER, etc.,
Petitioner,

vs.

F. DAVID MATHEWS, etc., et al.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner Bruce Baker prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in the above-entitled case on July 22, 1976, as amended upon denial of petitioner's petition for rehearing on March 24, 1977.

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Northern District of California (Albert C. Wollenberg, District Judge) is contained in an unreported Judgment and Order Granting Summary Judgment For Defendants dated June 11, 1974. The United States Court of Appeals

for the Ninth Circuit (Circuit Judges Chambers, Kilkenny and Trask) rendered a per curiam opinion on July 22, 1976, which was reported at 538 F. 2d 855. This opinion was amended by an Order of the Court of Appeals on March 24, 1977, denying petitioner's petition for rehearing; this Order has not yet been reported.

JURISDICTION

The jurisdiction of the District Court was invoked on the basis of federal question jurisdiction and federal mandamus jurisdiction. 28 U.S.C. §§ 1331 and 1361.

The judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was dated July 22, 1976. The Court of Appeals amended this opinion in an Order dated March 24, 1977, denying petitioner's petition for rehearing.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Are taxpayers of a municipality who challenge employer contributions to Social Security made by their School District required to exhaust administrative remedies which they do not have before they can file suit to challenge the contributions?

2. Does § 205(h) of the Social Security Act preclude jurisdiction under 28 U.S.C. §§ 1331 and 1361 for actions arising under said Act which do not seek to recover on claims for benefits and for which there is no administrative remedy?

3. Do taxpayers of a municipality have standing to challenge employer contributions to Social Security made by their School District?

THE STATUTE INVOLVED

The principal statute involved in this case is § 205(h) of the Social Security Act (42 U.S.C. § 405(h)), which reads:

> (h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

STATEMENT OF THE CASE

Petitioner Bruce Baker is a citizen resident of the City and County of San Francisco, California, who within one year of the commencement of this action, has paid taxes therein. He brought this action as a class action on behalf of all citizen resident taxpayers of San Francisco. Jurisdiction is asserted under 28 U.S.C. §§ 1331 and 1361.

In his complaint petitioner seeks a judicial declaration that the San Francisco Unified School District ("School District") has unlawfully and unconstitutionally made matching Social Security contributions on behalf of approximately 3,500 of its employees since July 1, 1972, an injunction against the making of further contributions, and an order requiring the return to the School District of the contributions it has made since July 1, 1972.

Respondents include each governmental official and body participating in the collection of the challenged contributions: the Secretary of Health, Education and Welfare ("Secretary"), who administers the collection of the contributions; the Secretary of the Treasury, who receives the contributions; various State of California defendants,

who collect the contributions from the School District and pay them to the Secretary of the Treasury; and the School District, its Superintendent and the Board of Education and its members, who are responsible for making the School District's employer contributions.

Petitioner has joined the School District and its related parties as defendants because the School District is united in interest with him in this suit but cannot be joined as a party plaintiff by reason of its opposition to this suit and the fact that it continues to make the challenged contributions.

The material facts of this case are undisputed. Prior to July 1, 1972, many teachers employed by the School District enjoyed Social Security coverage as members of a retirement system coverage group known as Group B of the San Francisco City and County Employees' Retirement System ("SFRS"). Effective that date, as allowed by California Education Code, § 14116.4, approximately 3,500 members of Group B of SFRS elected to terminate their memberships in SFRS and to join in the State Teachers' Retirement System ("STRS"), the members of which do not enjoy coverage, as such. Since July 1, 1972, the School District has continued to make matching employer contributions to Social Security on behalf of all former members of Group B of SFRS who have remained in the same employment capacity with the School District.

Petitioner has brought suit to challenge these contributions as illegal and unconstitutional expenditures of public funds. His principal contentions are two: that pursuant to § 218(d) of the Social Security Act ("Act") (42 U.S.C. § 418(d)), those teachers who left SFRS as of July 1, 1972 automatically ceased to be members of Group B of SFRS and to be covered in Social Security as members of that retirement system coverage group; and that because no other school district makes employer contributions on behalf of members of STRS, the School District is denied the equal protection of the laws in being required to make employer contributions on behalf of its employees who are members of STRS. Petitioner thus contends that the School District should have ceased making employer contributions on behalf of former members of Group B of SFRS as of July 1, 1972.

The District Court granted summary judgment for defendants on the merits. Because petitioner had no administrative remedy, the Court refused to dismiss the case for failure to exhaust administrative remedies.

On appeal, the Court of Appeals for the Ninth Circuit vacated the judgment of the District Court and remanded the case with instructions to dismiss for failure of petitioner to exhaust his administrative remedies. 538 F. 2d 855. The Court of Appeals did not identify the administrative remedies presumably available to petitioner.

In its decision, the Court of Appeals relied upon its contemporaneous decision in *RoAne v. Mathews,* 538 F. 2d 852, a related case brought by several former members of Group B of SFRS to challenge the Social Security deductions which continued to be made from their salaries after July 1, 1972. The Court of Appeals affirmed the District Court's dismissal of the *RoAne* complaint for failure of plaintiffs therein to exhaust their administrative remedies. The Court of Appeals' principal citation in *RoAne* was to *Weinberger v. Salfi,* 422 U.S. 749, 95 S. Ct. 2457 (1975). (See Appendix for text of *RoAne* decision).

In the case at bar, petitioner filed a petition for rehearing principally on the ground that he had no administrative remedy to exhaust. Petitioner also wrote the Secretary requesting to initiate his administrative remedies; in reply, the Secretary stated that petitioner, as a taxpayer, had

no administrative remedy. Petitioner brought this correspondence to the attention of the Court of Appeals by a motion to augment the record.

On March 24, 1977, the Court of Appeals denied the petition for rehearing. It amended its opinion to delete its previous conclusion that the District Court was without jurisdiction to grant summary judgment and, for the first time, to question petitioner's standing to prosecute the action. The Court did not rule on petitioner's motion to augment the record.

Before proceeding to the reasons for granting this writ, petitioner wishes to note that in this petition he does not seek to have the Supreme Court review the merits of this controversy. While the merits present significant, unresolved issues concerning the Act, they should first be reviewed by the Court of Appeals, which has not yet reached them. If this petition is granted and the Court of Appeals' decision is overturned, petitioner will be able to have the merits heard in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals for the Ninth Circuit Has Decided an Important Question Involving Jurisdiction Under the Social Security Act and the Standing of Local Taxpayers Which Has Not Been, But Should Be, Decided by This Court.

In a recent series of cases, the Supreme Court has considered the jurisdiction of federal courts to hear cases arising under the Social Security Act. Cf. *Weinberger v. Salfi, supra; Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893 (1976); *Califano v. Sanders,* .... U.S. ...., 97 S. Ct. 980 (1977). In these cases, all basically involving claims for benefits under the Act for which administrative remedies were available, the Court in effect limited jurisdiction of these claims to that available under §§ 205(g) and (h) of

the Act (42 U.S.C. § 405(g) and (h)). The Court has not yet had occasion to consider whether jurisdiction exists outside of §§ 205(g) and (h) for cases which do not involve claims for benefits but raise coverage questions under the Act for which no administrative remedy is available to the complaining party.

It is evident that the Court of Appeals for the Ninth Circuit based its decision in this case on the *Salfi* decision: it held that its *RoAne* decision was controlling herein, and *RoAne* was in turn governed by *Salfi.* Petitioner contends that *Salfi* neither requires nor justifies the result reached by the Court of Appeals herein and that none of the decisions of the Supreme Court since *Salfi* has settled the issues before this Court in this petition.

There are two irreconcilable distinctions between *Baker* and the three above-cited Supreme Court decisions. The first is that in each of the three decisions both an administrative remedy and judicial review under § 205(g) were available to the claimant; even in *Califano v. Sanders,* where the Court held that there was no judicial review of a refusal to reopen a claim for benefits, judicial review of the original claim had been available.

In *Baker,* petitioner has neither an administrative remedy nor, after the Court of Appeals' decision, judicial review of his dispute. The Court of Appeals did not specify the administrative remedy which it found petitioner failed to exhaust, and the Secretary's letter of October 7, 1976, which was disclosed to the Court of Appeals in petitioner's motion to augment the record, flatly states that petitioner has no administrative remedy. Hence, none of the three cited Supreme Court cases is authority for precluding jurisdiction where no administrative remedy is available, and petitioner submits that this issue should be resolved by the Supreme Court.

The second distinction is that *Baker* does not involve a claim for benefits, whereas each of the three cited cases does in one way or another. Section 205(h) of the Act bars any action against the Secretary under former section 41 of Title 28 (e.g., 28 U.S.C. § 1331) "to recover on any claim arising under this subchapter." Petitioner submits that the quoted language plainly refers to actions to recover on claims for benefits. So far no case has extended the meaning of the phrase "to recover on any claim" to disputes not involving claims for benefits, such as the one at bar. Whether or not § 205(h) precludes all actions involving the Act, including one which does not seek recovery on a claim, should be settled by this Court.

The question of whether or not § 205(h) precludes jurisdiction under 28 U.S.C. § 1361 also has not been decided by this Court. Petitioner has asserted § 1361 jurisdiction, and in the related *RoAne* proceeding the Court of Appeals held that the Act precluded § 1361 jurisdiction. However, § 205(h) specifically bars jurisdiction only under former section 41 of Title 28, and § 1361 was never part of said section 41. If one follows the settled rule that judicial review is precluded only where the statute manifests a clear and convincing intent to do so, *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S. Ct. 1507 (1967), § 205(h) can only be read as not specifically precluding § 1361 jurisdiction.

The cases of *Mathews v. Eldridge, supra,* n. 12, 424 U.S. at 331, 96 S. Ct. at 901, and *Norton v. Mathews,* ..... U.S. ....., 96 S. Ct. 2771, 2774 (1976) make it clear that this issue has not been decided. In *Ryan v. Shea,* 525 F. 2d 268 (10th Cir. 1975), for example, one Court of Appeals has held that *Salfi* did not preclude mandamus jurisdiction. The present case squarely raises the issue, and petitioner submits that the scope of the preclusive effect of § 205(h) should now be settled by this Court.

The question of petitioner's standing, which the Court of Appeals raised in an apparent afterthought in its order denying the petition for rehearing, also has not been decided by the Supreme Court.

Petitioner seems squarely to meet the general rules of standing. He has a sufficient personal stake in the outcome of this controversy so as to assure that concrete adverseness which sharpens the presentation of the issues, for, as a taxpayer at a time when rising property taxes are a prime public concern, he has a clear personal stake in reducing his school district's annual expenditures by as much as two million dollars. *Flast v. Cohen,* 392 U.S. 83, 99, 88 S. Ct. 1942, 1952 (1968). As well, the action of the defendants in making and collecting the challenged contributions injures him in fact by increasing his taxes, and he is clearly within the zone of interests to be protected or regulated by the Act and the asserted constitutional guarantee, in that he stands in the shoes of the School District, which makes the challenged contributions pursuant to the statutory authorization for coverage of State and local employees who are members of retirement systems (§ 218(d) of the Act). *Association of Data Processing Service Organization, Inc. v. Camp,* 397 U.S. 150, 153, 90 S. Ct. 827, 830 (1970). No case has decided whether or not a local taxpayer has standing to challenge illegal Social Security contributions made by a public employer.

The principal issues in the Court of Appeals' decision (exhaustion of administrative remedies and standing) have great significance. Not only does the controversy involve a substantial expenditure of public funds, the issues of exhaustion and standing involve the very right of a taxpayer to challenge illegal public expenditures. Furthermore, the merits of the controversy involve important questions of

coverage under the Act which might not otherwise be reached if petitioner is denied his day in court.

If a taxpayer of a community has no means of challenging the legality of expenditures such as those challenged herein, the expenditures may well go unchallenged. A suit by the affected teachers does not afford the taxpayer a remedy, for the law does not condition the right to judicial review of San Francisco taxpayers, or of the School District on behalf of which petitioner sues, on the initiation by another party of a remedy which petitioner cannot initiate. If this were the law, petitioner could not get into Court if no teacher initiated his administrative remedy.

The Supreme Court has explicitly sanctioned the trend "toward enlargement of the class of people who may protest administrative action." *Data Processing,* 397 U.S. at 154, 90 S. Ct. at 830. Yet the decision of the Court of Appeals has closed the courts to petitioner's protest. In view of the fact that the issues decided by the Court of Appeals have not been settled by the Supreme Court and are outgrowths of recent Supreme Court decisions, petitioner respectfully asks the Court to decide whether or not petitioner may obtain judicial review of his protest.

II. The Court of Appeals for the Ninth Circuit Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

In every case petitioner has found which was dismissed for failure to exhaust administrative remedies, the unsuccessful plaintiff has had an administrative remedy which he failed to exhaust. As the Court of Appeals noted in its *RoAne* decision, the purpose of the exhaustion requirement "is to permit the agency to function efficiently, to afford it an opportunity to correct its own errors, to give the court

the benefit of agency experience, and to compile a record that is adequate for judicial review," citing *Weinberger v. Salfi, supra,* and *McKart v. United States,* 395 U.S. 185, 193-194, 89 S. Ct. 1657 (1969). *RoAne v. Mathews,* 538 F. 2d at 854.

Yet, without a doubt, petitioner has no remedy to bring his controversy to the Secretary's attention. The Secretary has unequivocally confirmed that he has no remedy, and the Court of Appeals has not identified any remedy he failed to exhaust. The remedy found available to teachers in *RoAne* is not available to petitioner, for he is not a teacher. In the absence of a remedy, the purpose of the exhaustion requirement cannot be served.

The decision of the Court of Appeals is also contrary to the accepted rule that judicial review should be precluded only where a statute manifests such Congressional intent by clear and convincing evidence. *Abbott Laboratories v. Gardner, supra.* Section 205(h) manifests no such intent. It plainly prohibits actions "to recover on any claim arising under this subchapter"; it says nothing about actions to challenge employer contributions to Social Security.

The decision of the Court of Appeals also conflicts with the accepted standards for standing. As discussed above, petitioner certainly has a sufficient personal stake in the outcome of this controversy so as to assure concrete adverseness in the presentation of the issues, *Flast v. Cohen, supra,* and he clearly meets the two-part test set forth in the *Data Processing* case. Yet the Court of Appeals, in a one-sentence amendment to its decision in denying the petition for rehearing, questioned whether petitioner has standing.

With all due respect, petitioner sees no rationale to the decision of the Court of Appeals. It is nonsensical to dis-

miss a case for failure to exhaust administrative remedies where there is no remedy. If the Court's dismissal was for lack of jurisdiction, why did it delete its conclusion that the district court was without jurisdiction when it denied the petition for rehearing? Finally, can its rationale be a finding that petitioner lacks standing, when its only discussion of standing is in the form of a question in the last sentence of its amended opinion?

In these circumstances, petitioner respectfully asks the Supreme Court to hear this case so as to resolve the issues raised herein in conformity with the usual course of judicial proceedings and to affirm the right of a local taxpayer to challenge expenditures made by his school district.

CONCLUSION

For the reasons stated, petitioner respectfully requests the Court to grant the writ of certiorari in accordance with the prayer of this petition.

DATED: June 20, 1977

Respectfully submitted,

F. BRADFORD NIEBLING
Counsel for Petitioner

Appendix

OPINIONS AND JUDGMENTS OF THE COURTS BELOW

1. Judgment and Order Granting Summary Judgment for Defendants of the District Court dated June 11, 1974.

Original Filed Jun 11, 1974
Clerk, U. S. Dist. Court
San Francisco

In the United States District Court for the Northern District of California

Civil No. 74-274 ACW

Bruce Baker, et al.,
Plaintiffs,

vs.

Caspar W. Weinberger, et al.,
Defendants.

JUDGMENT

Cross motions for summary judgment and Defendants' motion to dismiss having come before the Court, Honorable Albert C. Wollenberg, District Judge, presiding, and the issues having been duly presented by the parties, and there being no material facts in controversy, and a decision having been duly rendered.

IT IS THEREFORE ORDERED that Plaintiffs' motion for summary judgment is hereby DENIED, and

IT IS FURTHER ORDERED that Defendants' motion to dismiss is DENIED, and

IT IS FURTHER ORDERED that Defendants' motion for summary judgment is GRANTED, that Plaintiffs take nothing and that the action be dismissed on the merits.

DATED: June 11, 1974.

ALBERT C. WOLLENBERG

United States District Judge

Original Filed Jun 11, 1974
Clerk, U. S. Dist. Court
San Francisco

In the United States District Court for the Northern District of California

Civil No. 74-274 ACW

Bruce Baker, et al.,
Plaintiffs,
vs.
Caspar W. Weinberger, et al.,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANTS

This is a taxpayers' suit challenging Social Security contributions made by the San Francisco Unified School District on behalf of certain of its employees. Plaintiffs claim the employees are not actually covered by the Social Security Act and that the contributions made by the School District on their behalf are being made in excess of lawful authority and should be returned to the School District. Plaintiffs and Federal Defendants have moved for summary judgment, and, in addition, Federal Defendants have moved to dismiss the complaint. In this case Plaintiffs sue in their capacity as taxpayers rather than as employees of the School District. Otherwise the facts are as set forth in the Court's order of dismissal in *RoAne v. Weinberger,* Case No. C-73-1183 ACW (N.D. Cal. filed March 28, 1974).

The complaint in *RoAne v. Weinberger, supra,* was dismissed for failure to exhaust administrative remedies. In the present action Plaintiffs correctly assert exhaustion is not required because no such administrative remedies

exist. *Canton v. Spokane School District #81,* .....F.2d ....., slip op. at 6 (9th Cir. decided May 13, 1974).

In considering the merits of this lawsuit, the Court is afforded the benefit of a recent Social Security Ruling which considered whether Social Security coverage continued after a state employee position was transferred from a covered retirement system to a non-covered retirement system. SSR 74-5 (January 1974). The present lawsuit concerns an identical situation, where the San Francisco Unified School District employees in question initially belonged to the San Francisco City and County Employees' Retirement System, a coverage group under the Social Security Act, and later became members of a non-coverage group, the State Teachers' Retirement System.

Whether these School District employees continue to be covered under the Act depends upon the construction given 42 U.S.C. §§ 418(d)(4)(A) and 418(g), which concern under what circumstances employees are members of coverage groups and how coverage may be terminated. Congress clearly intended that this section would receive an administrative interpretation before review by a court. *See* 42 U.S.C. § 418(s). The construction given a statute by the administrative agency charged with the responsibility of administering the statute must be given great weight. *Udall v. Tallman,* 380 U.S. 1, 16 (1965). In reviewing the construction given a statute by the appropriate agency, "we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Udall v. Tallman, supra,* at 16, quoting *Unemployment Compensation Commission v. Aragon,* 329 U.S. 143, 153 (1946).

The interpretations of 42 U.S.C. §§ 418(d)(4)(A) and 418(g) announced in SSR 74-5[1] are entirely reasonable as this Court reads those sections, and, accordingly, those interpretations will not be disturbed. Summary judgment will be entered in favor of the Defendants.

Dated: June 11, 1974.

ALBERT C. WOLLENBERG
United States District Judge

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1. The relevant portion of SSR 74-5 is as follows:
Subsection 218(d)(4)(A) of the act, [42 U.S.C. § 418(d)(4)(A),] clearly states that for the purposes of providing coverage a deemed separate coverage group includes employees in positions which were covered by the same retirement system ". . . on the date the agreement was made applicable to such system. . . ." Nowhere in section 218 does it indicate that once such coverage is effectuated its continuity depends on whether the positions continue to be covered by the retirement system after the date the agreement was made applicable to such system. Similarly, once a position is properly covered as part of an absolute coverage group, there is nothing in section 218 which allows the continuity of such coverage to be affected merely by the later extension of coverage under a retirement system to that position. Rather, coverage of the coverage group continues until it is ended in accordance with the provisions of subsection 218(g) [42 U.S.C. § 418(g)] relating to termination of coverage. If section 218 coverage of a retirement system coverage group may be ended at any time merely by removing retirement system coverage, then the provisions of subsection 218(g) relating to termination of coverage might well be rendered meaningless with respect to retirement system coverage groups.

2. Opinion of the United States Court of Appeals Dated July 22, 1976.

(Corrected: August 4, 1976)

United States Court of Appeals
For the Ninth Circuit

Bruce Baker, et al.,
Appellants,
vs.
F. David Mathews, Secretary of Health, Education and Welfare, et al.,
Appellees.

No. 74-2487
OPINION

[July 22, 1976]

Appeal from the United States District Court
Northern District of California

Before: CHAMBERS, KILKENNY and TRASK, Circuit Judges. PER CURIAM:

Appellants appeal from a summary judgment of the district court dismissing their class action seeking declaratory, injunctive, and other relief, including repayment to the school district of all Social Security contributions made since July 1, 1972. Appellants claim jurisdiction under 28 U.S.C. § 1331, the Fifth and Fourteenth Amendments to the Constitution, and 42 U.S.C. § 418 on their first cause of action, and 28 U.S.C. § 1361 on their second claim.

FACTS

This taxpayers' suit challenges the legality of certain Social Security contributions made by the San Francisco

Unified School District on behalf of certain of its employees. Appellants claim that the employees are not in fact covered by the Social Security Act and the contributions made by the school district on their behalf have been made in excess of lawful authority and should be returned to the school district. Other than the capacity in which appellants prosecute this action, the facts are identical with those set forth in *RoAne v. Mathews,* ..... F.2d ..... (CA9, July 22, 1976), this day decided. There we affirmed the district court's order of dismissal for failure to exhaust administrative remedies.

DISCUSSION

Relying upon *Canton v. Spokane School District No. 81,* 498 F.2d 840 (CA9 1974), the district court expressed the view that appellants had no administrative remedies and, consequently, the doctrine of exhaustion was not applicable. *Canton* states the general rule that in claims prosecuted under the Civil Rights Act state judicial remedies need not be exhausted in order to perfect a federal claim. Of course, this is not a Civil Rights case, and there is nothing in *Canton* which even remotely suggests that the doctrine of exhaustion of federal remedies should not be employed where, as here, the very core of the claim is dependent upon a construction of the relevant provisions of the Social Security Act[1] and the regulations promulgated thereunder.

We find no significant distinction between the factual background in *RoAne* and that presented on the record before us. Each, in the final analysis, presents a claim under the Social Security Act involving a construction of the relevant provisions of that Act. The fact that appellants may prosecute this action as taxpayers, rather than in the capacity of school teachers, as in *RoAne,* is of no importance.

1. 42 U.S.C. §§ 405, 418.

CONCLUSION

We conclude that *RoAne* is controlling and that the district judge was without jurisdiction to grant the summary judgment. The judgment is vacated and the cause remanded with instructions to dismiss for failure of appellants to exhaust their administrative remedies.

3. Order of the United States Court of Appeals Dated March 24, 1977.

Filed—Mar 24 1977
Emil E. Melfi, Jr.
Clerk U.S. Court of Appeals

United States Court of Appeals
Ninth Circuit

Bruce Baker, et al., *Appellants,* v. F. David Mathews, Secretary of Health, Education and Welfare, et al., *Appellee.*	No. 74-2487 ORDER

Appeal from the United States District Court
Northern District of California

Before: CHAMBERS, KILKENNY and TRASK, Circuit Judges.

The petition for rehearing is denied.

The final paragraph of our opinion, *Baker v. Mathews,* 538 F.2d 855, 856, is amended to read as follows:

> "We conclude that *RoAne* is controlling and that the district court should not have granted the summary judgment on the merits. The judgment is vacated and the cause remanded with instructions to dismiss for failure of appellants to exhaust their administrative remedies. Above and beyond the reasons stated in our opinion, we question if appellants have standing to prosecute the action."

IT IS SO ORDERED.

4. Opinion of the United States Court of Appeals in RoAne v. Mathews Dated July 22, 1976.

United States Court of Appeals
For the Ninth Circuit

Susan RoAne, et al., *Appellants,* vs. F. David Mathews, Secretary of Health, Education and Welfare, et al., *Appellees.*	No. 74-2346 OPINION

[July 22, 1976]

Appeal from the United States District Court
Northern District of California

Before: CHAMBERS, KILKENNY and TRASK, Circuit Judges.

PER CURIAM:

Appellants appeal from an order of the district court dismissing their class action seeking declaratory, injunctive, and other relief, including reimbursement for Social Security contributions made since July 1, 1972.

FACTS

Appellants are employees of the San Francisco Unified School District, and became so employed between October 16, 1969, and July 1, 1972. Upon entering employment, each, without affirmative action, became a member of the San Francisco City and County Employees' Retirement System (SFRS). In conformity with the provisions of 42 U.S.C.

§ 418, and under the terms of an agreement entitled "Modification No. 296" between the Secretary of Health, Education, and Welfare (Secretary) and the State of California (State) acting through the Board of Administration of the State Employees' Retirement System, appellants either became covered by the provisions of the Social Security Act simultaneously with their employment, or they subsequently elected such coverage. On July 1, 1972, a recently enacted California statute became effective and required appellants to elect whether to remain in the SFRS, and thereby continue to be covered by the Social Security Act, or to resign from SFRS, join the State Teachers' Retirement System (STRS), and thereby terminate their coverage under the Social Security Act. Although appellants all chose to join the STRS and to terminate Social Security coverage, since July 1, 1972, Social Security contributions have continued to be deducted from their salaries. In this lawsuit, appellants and the members of their class seek a declaration that they are not covered by the Social Security Act and, consequently, do not qualify for Social Security benefits, a refund of the contributions already paid, and an injunction against further deductions for Social Security contributions from their salaries.

Their second claim is in the nature of a petition for writ of mandamus to compel appellees to return to appellants, and the members of their class, all Social Security contributions made by them from and after July 1, 1972.

DISCUSSION

Inasmuch as appellants' claims require construction of the relevant provisions of Title II of the Social Security Act, and the regulations promulgated thereunder, and in view of the admitted fact that appellants did not, prior to the institution of this litigation, seek an exhaustion of their administrative remedies under 42 U.S.C. § 405(g)(h), we agree with the district court that it had no jurisdiction to consider the claims. The necessity of exhausting administrative remedies under the Act has recently been restated and emphasized in *Weinberger v. Salfi,* 422 U.S. 749 (1975).

Appellants, in a showing outside of the record, call attention to the fact that a number of appellants have now exhausted their administrative remedies by securing a decision of the Secretary on the issues here presented, invite us to disregard the requirements of the Act and proceed to decide their claims on the merits. We decline the invitation for the following reasons: (1) we seriously question our jurisdiction to proceed; (2) such a procedure would set a harmful precedent; and (3) upon review, the district court is entitled to the benefit of such expertise as the Secretary may employ in deciding the claims and in construing the Act and regulations.

The purpose of exhaustion of remedies is to permit the agency to function efficiently, to afford it an opportunity to correct its own errors, to give the court the benefit of agency experience, and to compile a record that is adequate for judicial review. *Weinberger v. Salfi, supra; McKart v. United States,* 395 U.S. 185, 193-194 (1969). The discussions, findings, and conclusions of the Secretary presented to us in connection with the appellants' invitation are precise, detailed, and exhaustive. On review by the district court, such findings and conclusions would be of unquestionable assistance in construing the relevant legislation and in passing on the validity of the respective claims. *See Salfi, supra.*

Moreover, we agree with the State appellees that the appellants must exhaust their federal administrative remedies before obtaining a judicial review of their rights,

if any, against those appellees growing out of the Social Security Act and the related contract with the State of California. The claims against State appellees are likewise tied to a construction of the relevant Social Security legislation to which we previously referred.

For the reasons just stated, we conclude that the district court had no jurisdiction under 28 U.S.C. § 1331 to entertain a claim against either State or Federal appellees.

Similarly, the construction placed on the relevant provisions of the Social Security Act by the Supreme Court in *Salfi, supra,* lodges exclusive jurisdiction of claims under the Act in the agency, subject only to review by the district court as provided for in the Act. In these circumstances, the issuance of a writ of mandamus pursuant to 28 U.S.C. § 1361 would be wholly unwarranted. The recent cases of *Kerr v. United States District Court,* ..... U.S. ..... (June 14, 1976); *Mathews v. Diaz,* ..... U.S. ..... (June 1, 1976), and *Mathews v. Eldridge,* ..... U.S. ..... (Feb. 24, 1976), support the view that mandamus will not lie in these circumstances.

CONCLUSION

The judgment of the district court is affirmed. However, we are aware of no reason why the Secretary should not permit all appellants, if they so desire, to join in the proceedings before him and prosecute their claims before the district court in accordance with the provisions of the Act. He might even consider the status of the class action plaintiffs. *Jimenez v. Weinberger,* 523 F.2d 689 (CA7 1975).

JUDGMENT AFFIRMED.

No. 76-1825

Supreme Court, U.S.
FILED
AUG 12 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

BRUCE BAKER, PETITIONER

v.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1825

BRUCE BAKER, PETITIONER

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

This is one of two companion cases in which the plaintiffs seek to establish that some 3,500 employees of the San Francisco Unified School District are no longer covered by Social Security. Prior to July 1, 1972, these employees belonged to the San Francisco City and County Employees' Retirement System (SFRS), and they were covered by Social Security as members of a Social Security coverage group known as Group B of SFRS, pursuant to an agreement between HEW and the State of California (Pet. App. 2-3, 9-10).[1] See 42 U.S.C. 418. Pursuant to a

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[1]Group B consists of those employees covered by SFRS who elected Social Security coverage in 1959 (when California entered into the agreement providing for Social Security coverage for SFRS-covered employees) and all of those who thereafter commenced employment in positions covered by SFRS. See 42 U.S.C. 418(d)(6)(C).

California statute effective July 1, 1972, approximately 3,500 members of Group B of SFRS elected to leave the SFRS and to join the State Teachers' Retirement System (STRS) (Pet. App. 10). Although these employees are no longer covered by SFRS, the State, the school district, and the Secretary of Health, Education, and Welfare nonetheless have continued to treat them as members of the established Social Security coverage group. See 42 U.S.C. 418(c)(1), (d)(4).

In the instant case, petitioner, a San Francisco taxpayer, challenged the school district's payment of the employer contributions on behalf of these employees. In the companion case, *RoAne* v. *Mathews*, 538 F. 2d 852 (C.A. 9), several of the teachers themselves requested certification of a class of all 3,500 employees and sought a refund of Social Security contributions made after July 1, 1972, and an end to further deductions from their salaries for Social Security contributions. Both suits were based upon the contention that under 42 U.S.C. 418(d) the employees' Social Security coverage terminated when they left SFRS. The plaintiffs also asserted that continued coverage violated due process and equal protection. In the instant case the district court found against the petitioner on the merits of his claim, deferring to a previous interpretation of the Act by the Secretary (Pet. App. 1-4). In *RoAne* the district court dismissed the complaint for failure to exhaust administrative remedies (Pet. App. 2).

The court of appeals affirmed in both cases (Pet. App. 5-8, 9-12). In *RoAne* it relied on *Weinberger* v. *Salfi*, 422 U.S. 749, to hold that the district court lacked jurisdiction because the plaintiffs had failed to exhaust their administrative remedies (Pet. App. 9-12). In this case the court of appeals found no significant distinction from *RoAne*

(Pet. App. 6); following a petition for rehearing, the court amended the concluding paragraph of its opinion in this case to read (Pet. App. 8):

> We conclude that *RoAne* is controlling and that the district court should not have granted the summary judgment on the merits. The judgment is vacated and the cause remanded with instructions to dismiss for failure of appellants to exhaust their administrative remedies. Above and beyond the reasons stated in our opinion, we question if appellants have standing to prosecute the action.

1. Petitioner contends that exhaustion of administrative remedies should not be required in this case because there is no administrative remedy available to him as a taxpayer (Pet. 7). We agree that the "exhaustion" doctrine as such does not apply to petitioner. But the very fact that he has no administrative remedy indicates, in the circumstances here, that he has no judicial remedy either.

The Act provides a means by which the employees (or beneficiaries) may raise the issue of coverage with the Secretary, have an administrative hearing, and seek judicial review. 42 U.S.C. 405(c)(4)-(8), (g). The Act also provides that the states may raise questions concerning the coverage of state and local employees administratively, and seek judicial review. 42 U.S.C. 418(s), (t). These express provisions for judicial review of state and local government Social Security coverage issues are exclusive. 42 U.S.C. 405(h); see *Weinberger* v. *Salfi*, 422 U.S. 749, 757-760; *Mathews* v. *Eldridge*, 424 U.S. 319, 326-328.

There is no statutory provision authorizing persons other than those for whom administrative remedies are provided to seek judicial review of claims arising under

Title II of the Social Security Act. See 42 U.S.C. 405(g), (h). Cf. *Califano* v. *Sanders*, No. 75-1443, decided February 23, 1977 (concurring opinion of Mr. Justice Stewart).[2] It follows that the Act provides no jurisdiction to review petitioner's claim.

2. Moreover, petitioner lacks standing as a taxpayer to pursue the instant case. His challenge is not based upon specific constitutional limitations on the taxing or spending power of Congress, or of the school district. Instead, it is based on the provisions of the Social Security Act, or arguably on the Due Process Clause of the Constitution. Accordingly, petitioner's status as a taxpayer is insufficient to establish standing, because there is no logical nexus between his taxpayer status and the assertedly improper nature of the contribution of school district funds to HEW. *United States* v. *Richardson*, 418 U.S. 166, 172-175; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227-228.[3]

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[2]Petitioner attempts to limit recent interpretations by this Court of 42 U.S.C. 405(h) to cases involving "claims for benefits" (Pet. 8). Section 405(h), however, applies to "decisions of the Secretary," and precludes jurisdiction over actions "to recover on *any* claim arising under this subchapter" (emphasis added). Petitioner's suit—challenging the coverage of a group of employees—is a "claim," and the mere fact that this claim has not been made in one of the particular contexts provided for by the Act does not excuse it from the jurisdictional bar. On the contrary, the very purpose of 42 U.S.C. 405 (h) is to channel challenges to administrative decisions on the part of the Secretary through the specific administrative procedures provided by the Act. As this Court observed in *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 757, the first two sentences of that statute "prevent review of decisions of the Secretary save as provided in the Act, which provision is made in §405(g)."

[3]These cases have been applied in challenges to spending on the part of local governments as well as on the part of the United States. *Reich* v. *City of Freeport*, 527 F. 2d 666, 670 n. 8 (C.A. 7); *Korioth* v. *Briscoe*, 523 F. 2d 1271, 1277 (C.A. 5). Moreover, taxpayer standing is not necessary in order to insure protection of the rights asserted, since the employers involved are not disabled from asserting their own right in a proper case. See *Warth* v. *Seldin*, 422 U.S. 490, 509-510.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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Petitioner,

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F. DAVID MATHEWS, etc., et al.,

Respondent.

Petitioner's Supplemental Brief in Support of Petition for Writ of Certiorari

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Petitioner's Supplemental Brief in Support of Petition for Writ of Certiorari

Petitioner submits this supplemental brief in order to bring a new case to the Court's attention and to rebut the contentions of the Federal Respondents in their Memorandum in Opposition.

I. A NEW CASE DEMONSTRATES THE UNSETTLED STATE OF THE ISSUES HEREIN.

The case of *Mid Atlantic Nephrology Center, Ltd. v. Califano*, 433 F. Supp. 23 (D. Md. 1977) has appeared in the advance sheets since the filing of the Petition for Writ of Certiorari herein. The issues there are identical to those raised by this Petition, yet the District Court there reached the opposite conclusion from the Court of Appeals herein.

Plaintiffs in *Mid Atlantic* were a dialysis treatment facility operator and a State administrative body which sought to enjoin Federal approval of a competing dialysis clinic. Neither plaintiff had an administrative remedy to challenge the Federal approval, and neither sought recovery of Social Security benefits.

At the threshold the Court was faced with the issue of whether or not § 205(h) of the Social Security Act (42 U.S.C. § 405(h)) precluded jurisdiction under 28 U.S.C. § 1331 in light of the three recent Supreme Court rulings defining the scope of § 205(h), *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457 (1975); *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976); *Califano v. Sanders*, ... U.S. ....., 97 S. Ct. 980 (1977).[1] The District Court concluded that § 1331 jurisdiction was available. It distinguished the three Supreme Court cases on the very two grounds offered in the Petition to distinguish the case at bar: the absence of a statutory review process and the fact that the action did not seek to recover on a claim for benefits.

In these two respects, the case at bar is functionally identical to the *Mid Atlantic* case, for petitioner has no administrative remedy and does not seek to recover on a claim for benefits. The fact that the *Mid Atlantic* case arises under the Medicare Act rather than the Social Security Act is of no moment, for the ultimate issue in both cases is simply the scope of § 205(h). The *Mid Atlantic* case is the only case before the Court at all on point.

Clearly, the *Mid Atlantic* case, as well as other Medicare cases cited therein (see, e.g., *Americana Nursing Centers, Inc. v. Weinberger*, 387 F. Supp. 1116 (S.D. Ill. 1975);

1. 42 U.S.C. § 1395ii makes the provisions of § 205(h) applicable to actions arising under Title XVIII (Medicare) of the Social Security Act "to the same extent as they are applicable with respect to" Title II (Benefits) of the Act. 433 F. Supp. at 31.

Humana of South Carolina, Inc. v. Mathews, 419 F. Supp. 253 (D.D.C. 1976), appeal pending (particularly fn. 3)), conflicts with the decision of the Court of Appeals herein. A hearing by the Supreme Court of the case at bar would settle the issue left open by *Salfi* and subsequent cases as to the scope of § 205(h), i.e., whether § 205(h) precludes jurisdiction of actions against the Secretary which do not seek to recover on a claim for benefits and for which there is no administrative review. Because this issue arises in many contexts, its determination will have a far-reaching impact.

II. THE CONTENTIONS OF THE FEDERAL RESPONDENTS IN THEIR OPPOSITION DO NOT SUBSTANTIATE THE COURT OF APPEALS' DECISION.

The Federal respondents in their Memorandum in Opposition immediately acknowledge that the doctrine of exhaustion of administrative remedies does not apply to petitioner. Since this doctrine is the very premise of the Court of Appeals' decision, the decision should forthwith be vacated.

The Federal respondents offer two arguments to validate the Court of Appeals' decision. The first is that § 205(h) precludes jurisdiction to review petitioner's claim. The *Salfi, Eldridge,* and *Sanders* cases are cited for this proposition; yet, as just discussed, all three involve factual situations materially distinct from the case at bar.

The Federal respondents suggest that § 205(h) applies to all decisions of the Secretary, regardless of whether provision is made for administrative or judicial review thereof, and to all claims before the Secretary of whatever nature, regardless of whether for benefits or not. The statute does not support this reading.

The proscription against review of the decisions of the Secretary is clearly limited by the first sentence of § 205(h) to "decisions of the Secretary [made] after a hearing." Thus, where a decision is made without a hearing, as herein, there is no proscription.

Likewise, the proscription of actions against the Secretary does not apply to all claims. It specifically applies only to actions "to recover on any claim." As the *Mid Atlantic* Court has noted, any action for injunctive relief is not an action "to recover on any claim." The gravamen of petitioner's complaint is simply injunctive relief.

In discussing jurisdiction, the Federal respondents ignore the settled rule that jurisdiction is precluded only where there is "clear and convincing evidence" of such Congressional purpose. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141, 87 S. Ct. 1507, 1511 (1967). Section 205(h) provides no evidence that Congress intended to bar jurisdiction of actions for which there is no provision for administrative or judicial review or which seek relief other than recovery on a claim for benefits.

Thus, the Court of Appeals could not dismiss for lack of jurisdiction. In fact, it did not do so, as its abandonment of jurisdiction as the basis of its decision in its amended opinion on rehearing makes clear.

Likewise, § 205(h) is no bar to § 1361 jurisdiction, which the Federal respondents do not discuss. There is no clear and convincing evidence that § 205(h) was intended to preclude § 1361 jurisdiction, particularly since § 205(h) does not refer to § 1361. Notably, the Court in the *Mid Atlantic* case rejected § 1361 jurisdiction only because it could find no duty, not because § 205(h) was a bar. Implicit was the finding that such jurisdiction was available if the requisite duty could be established.

Thus, the only remaining prop for the Court of Appeals' decision is its afterthought regarding petitioner's standing to sue. Respondents suggest that petitioner lacks standing because his challenge is based on the Social Security Act, because there is no logical nexus between his status as a taxpayer of the School District and its improper contributions, and because the School District is not disabled fror. asserting its own rights.

Petitioner needs only show that he has a financial stake in the outcome of this litigation and that he is within the zone of interests to be regulated by the statute in question. *Association of Data Processing Service Organization, Inc. v. Camp,* 397 U.S. 150, 90 S. Ct. 827 (1970). He clearly has been injured by the challenged actions, for the School District's continued making of contributions substantially affects the amount of taxes he must pay. His is much more than the generalized interest of a citizen.

As well, the provisions of § 218 directly affect the conduct and finances of the School District. Section 218 is replete with references to political subdivisions and recognizes the possibility of employer contributions. See, e.g., § 218(e)(2). Thus, petitioner, as one of those who directly finances the School District, is well within the zone of interests to be regulated by § 218.

In also asserting the rights of the School District, petitioner comes within the exception to the *jus tertii* doctrine. By reason of the direct impact of the expenditures of the School District on him, he is so bound up in the interests of the School District that he will be directly affected by the outcome of the lawsuit and will be as effective an advocate as would the School District. *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868 (1976). Clearly, there is a genuine obstacle to the School District's assertion of its own rights, by reason of its continuing refusal to do so. *Id.*

Thus, petitioner urges the Court to hear this case not only to resolve an unsettled and important area of the law growing out of the Court's recent decisions but also to confirm the right of an injured party to obtain a judicial resolution of an important controversy which might otherwise go unresolved. Certainly the trend "toward enlargement of the class of people who may protest administrative action," *Data Processing, supra,* 397 U.S. at 154, 90 S. Ct. at 830, and the presumption in favor of judicial review of agency action, *Abbott Laboratories, supra,* justify the Court's hearing of this case.

Dated: September 28, 1977

Respectfully submitted,

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